

All provinces likely to join tobacco litigation

Seven provinces are preparing to jump on the litigation bandwagon following a Supreme Court of Canada decision that allows British Columbia to sue tobacco companies to recover billions in tobacco-related health care costs.

In a 9-0 decision Sept. 29, the Court found that a BC law authorizing the government to file a lawsuit against tobacco manufacturers is constitutional. *The Tobacco Damages and Health Care Costs Recovery Act* (1998), modelled after a Florida law, has been the subject of numerous court decisions and challenges. Canada's tobacco industry argued that BC overstepped its boundaries by trying to apply provincial legislation to companies outside its jurisdiction.

It will likely be 2 years before BC's lawsuit goes to trial against Imperial Tobacco Canada Ltd., JTI-McDonald Corp., Rothmans, Benson & Hedges Corp., and the Canadian Tobacco Manufacturers' Council, as well as foreign cigarette makers British American Tobacco (Investments) Ltd., Philip Morris Inc. and RJ Reynolds Tobacco Co., says Dan Webster, BC's chief counsel.

A month after the Supreme Court decision, 4 provinces (BC, Newfoundland and Labrador, Ontario and Nova Scotia) already have legislation in process to allow them to proceed with litigation. Four others (Alberta, Manitoba, Quebec and New Brunswick) say they will also move ahead with legislation. Prince Edward Island and Saskatchewan are undecided.

Physicians for a Smoke-Free Canada and the Non-Smokers Rights Association expect all jurisdictions to sue — or potentially miss out on recouping billions of dollars.

Just how much provinces might recover is the subject of speculation. Health Canada estimates tobacco-related health care costs total \$4 billion annually



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Canada's tobacco industry faces a barrage of litigation, including 3 class-action suits.

in Canada. BC estimates its costs at more than \$430 million last year.

Meanwhile, Canadian tobacco companies, with annual profits of about \$1.5 billion, have said judgments in these lawsuits could ultimately bankrupt them. Industry spokespeople say the big profit-makers in tobacco are the federal and provincial governments, which collected \$9 billion in tobacco taxes last year.

Preparing the tobacco companies' defence will take years, says Don McCarty, VP law at Imperial Tobacco Canada Ltd. "BC can expect long-winded and bad-tempered litigation," McCarty says. "It could be the biggest case in the history of Canadian jurisprudence."

A barrage of other litigation faced by the Canadian tobacco industry could affect the amount of any settlement and the viability of the industry, says lawyer Rob Cunningham, a senior policy analyst at the Canadian Cancer Society.

In Quebec, 2 class-action lawsuits claiming \$22.8 billion in damages have been certified. Another class action related to the claims of "light cigarettes" has been certified in BC. Finally, some provinces are suing for \$9.6 billion in

tax revenue lost during the early 1990s, when contraband cigarettes entered the country tax-free. The Quebec government has already levied a court order against JTI-McDonald in the contraband case for \$1.36-billion in unpaid taxes and interest. The company is now in bankruptcy protection.

The multitude of lawsuits could lead to hybrid settlements, like the US Master Settlement Agreement (1998), where tobacco companies were forced to pay 46 states \$200 billion over 25 years and prohibited from billboard advertising and product placement.

The industry in Canada is already subject to stringent marketing rules, leading non-smoking advocates to speculate that the lawsuits have the potential to "fundamentally and permanently reform tobacco industry behaviour," says Cunningham, such as banning all advertising and promotion.

Others have grander speculations. Cynthia Callard of Physicians for a Smoke-free Canada says there may be an opportunity to "gradually close the whole machine down by controlling supply." — Barbara Sibbald, CMAJ

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